

19 September 2003

Dear Licensee,

Digital Programme Services Licence

A. Consultation on Amendments proposed to be made to your Digital Programme Services Licence

1. As a result of the entry into force of the relevant provisions of the Communications Act (the “Act”), your current digital programme services (“DPS”) licence will be varied. Further to this variation, your licence will be called a digital television programme services (“DTPS”) licence.
2. In accordance with its duty under Section 3(4) of the Broadcasting Act 1996 (the “1996 Act”), Ofcom intends to vary your licence by means of a notice of variation. In particular, it is proposed that the notice of variation will replace the Schedule of Conditions to your existing licence with a new Schedule of Conditions. The proposed amendments reflect changes to the regulatory regime brought about by the Act¹ and, so far as is possible within the provisions of the regulatory regime, attempt to ensure consistency across all classes of Ofcom licences, both for television and radio services. Overall, the proposed amendments will result in your licence to all intents and purposes being the same as the standard form DTPS licence which Ofcom will issue to all new DTPS licensees. The notice of variation, which will be issued upon the completion of the consultation process, will come into effect on the date of commencement of the relevant statutory provisions (expected to be 29 December 2003), from which date you will have to comply with the terms and conditions of your licence as amended by the notice of variation.
3. Under Condition 17 of your current licence, and in accordance with Section 3(4) of the 1996 Act, your licence cannot be varied unless you have been given a reasonable opportunity to make representations concerning the proposed variations. You will find enclosed with this letter a copy of the varied Schedule of Conditions to your DPS licence, both in ‘clean’ form and in ‘marked-up’ form showing changes from the current DPS licence. Please submit any representations you may have on the amendments to be made to your licence to Peter Bourton by 27 October 2003. We will consider all representations received from DPS licensees prior to finalising the variation of the DPS licence.
4. You will find below a description of some of the amendments (including deletions) that Ofcom proposes to make to your licence by the notice of variation (as described above at paragraph 2, the Schedule to the notice of variation will be identical to the Schedule to the standard form DTPS licence). Please note that this description is only illustrative and is not exhaustive: it is only an indication of certain amendments which may affect your current rights and obligations. The fact

¹ A copy of the Act can be downloaded from www.legislation.hms.gov.uk or purchased from The Stationery Office Ltd (TSO).

that a provision has been crossed out in the 'marked-up' form of the varied DPS licence does not necessarily mean it has been omitted, as it may be found elsewhere in the varied DPS licence (see for example paragraph 18 below). Furthermore the fact that a provision has been deleted does not necessarily mean it is no longer enforceable. It may still be enforceable under another licence condition or by other means such as a code of practice. It is your responsibility to read the varied DPS licence carefully, and take appropriate legal advice, if necessary, to determine how your licence, as amended by the proposed notice of variation, would affect your business.

5. You should bear in mind when making representations about the proposed amendments that Ofcom is obliged by the Act to make certain amendments to your licence. Representations are therefore sought on areas where Ofcom will be able to exercise some discretion in its interpretation of the statutory provisions and the incorporation of those provisions in the licence.

B. General and/or Minor Amendments to your Licence

6. Ofcom proposes to make certain general and/or minor amendments to your licence. For example, as a result of the entry into force of the relevant provisions of the Act, references to the Independent Television Commission and the Broadcasting Standards Commission will be replaced by references to Ofcom. To ensure consistency with all classes of licence granted by Ofcom, the order and headings of some of the conditions in your licence will be changed and some minor variations will be made to the text of some of the conditions.

C. Main Proposed Amendments to your Licence Conditions

Deregulation and Contracting Out Act 1994

7. The Communications Act (Section 1(7)) allows the functions conferred on Ofcom to be contracted out under the Deregulation and Contracting Out Act 1994. It is proposed that your licence be amended to include a reference to this in Condition 1(6), so that in the event of an Order under the Deregulation and Contracting Out Act 1994 authorising a person to exercise any functions of Ofcom, relevant references in the licence to Ofcom would include a reference to that person.

New condition on quotas for independent programmes

8. *Varied DPS licence Condition 3*

As a result of the entry into force of the relevant provisions of the Act, it is proposed that a new condition in relation to quotas for independent programmes be included in your licence. This would replace the requirement with respect to independent productions in Condition 4(4) of the current DPS licence.

Fees

9. *Current DPS licence Condition 2; varied DPS licence Condition 4*

Note that it is proposed that the wording of this Condition be amended to facilitate Ofcom's use of its discretion to alter present arrangements.

V.A.T.

10. *Current DPS licence Condition 3; varied DPS licence Condition 5*

No changes are proposed to the provisions on V.A.T.. You should note that V.A.T. is not currently chargeable on licence fees. Provisions on interest on late payments may now be found in Condition 27 of the varied DPS licence. Note that in the proposed Condition the interest rate, at three per cent, has not changed (although the reference bank has).

Programme, advertising and sponsorship standards and requirements

11. *Current DPS licence Condition 4; varied DPS licence Condition 6*

Current DPS licence Condition 5; varied DPS licence Condition 8

As a result of the entry into force of the relevant provisions of the Act, new conditions in relation to general standards and requirements and advertising and sponsorship standards and requirements are proposed to replace your existing licence conditions. Under these proposed Conditions you would need to comply with a number of general standards and specific advertising and sponsorship standards and observe the provisions of the Standards Code (as defined in the varied DPS licence).

In particular, you should note Condition 6(1)(h) of the varied DPS licence which would require you to ensure that the inclusion of advertising which may be misleading, harmful or offensive is prevented. In addition, you should note Condition 8(3) of the varied DPS licence which describes what would be considered 'political' in the context of advertising and sponsorship requirements and Condition 8(6) of the varied DPS licence which would require you to observe the Ofcom code on premium rate services (or, in the absence of such a code, the terms of any order made by Ofcom under Section 122 of the Act).

As described above, requirements relating to independent productions (Condition 4(4) of the current DPS licence) are now covered by Condition 3 of the varied DPS licence. Requirements relating to programmes of European origin (Condition 4(3) of the current DPS licence) are now covered by Condition 17(2)(c) of the varied DPS licence (Compliance).

Finally, you should note that a similar provision to Condition 5(4) of the current DPS licence (arrangements to enable the Commission to preview advertisements) is included in the varied DPS licence in Condition 17(2)(d).

Listed events

12. *Current DPS licence Condition 7; varied DPS licence Condition 7*

Amendments are proposed to this Condition to take account of new provisions introduced by the Act. You will see there are new statutory provisions, in particular relating to Group B events, which reflect the current provisions of the ITC Code on Sports and other Listed and Designated Events 2002.

The Act provides for the existing concept of "listed events" to be divided into two categories, "Group A" and "Group B", which are then made subject to separate requirements. For example, Section 99(1) of the Broadcasting Act 1996, which makes a contract void if it purports to grant exclusive rights to televise a listed event live for reception in the UK, will apply only to Group A events. It will therefore become possible for valid contracts to be made granting such exclusive rights in relation to Group B events.

Also in relation to Group B events, the Act introduces a new ground upon which live coverage of a listed event can be included in the Licensed Service, specifically where rights to provide adequate alternative coverage have been acquired by one or more other persons who satisfy the requirements

of new Regulations that may be made by Ofcom. Note also that such Regulations may also determine the circumstances in which the televising of listed events is, or is not, to be treated as live. By virtue of the transitional provisions in the Act, the ITC's existing Code shall continue to have effect.

Condition 7(6) of the varied DPS licence is a new provision reflecting the amendment to the Broadcasting Act 1996 made by the Television Broadcasting Regulations SI 2000/54 and currently reflected in the ITC Code. It provides for restrictions on the televising of events designated by other EEA States. See also Condition 28(4) of the varied DPS licence.

Subtitling, signing and audio-description

13. *Current DPS licence Condition 6; varied DPS licence Condition 9*

Condition 9 of the varied DPS licence would require you to comply with a new Ofcom Code on subtitling, signing and audio-description. The Code will, among other things, reflect the targets in the Act for the proportion of programmes included in the Licensed Service to be subtitled, audio-described and presented in or translated into sign language. The requirement to notify the Commission, upon entering into an agreement with the holder of a multiplex licence, of proposals for complying with the code on subtitling would no longer be contained in this Condition.

Country of Establishment

14. *Current DPS licence Conditions 8(1)(a)(vi), 8(5)(j) and 24(2)(f); varied DPS licence Conditions 12(1)(e) and 29(2)(g)*

Please note that it is proposed that the obligation contained in Condition 8(5)(j) of your current licence be retained by way of the more general requirement set out in proposed Condition 12(1) of your varied licence.

New condition on electronic programme guides

15. *Varied DPS licence Condition 10*

As a result of the entry into force of the relevant provisions of the Act, Ofcom proposes to include a new condition in relation to electronic programme guides in your licence.

Provision of information

16. *Current DPS licence Condition 8; varied DPS licence Conditions 4, 11, 12 and 13*

It is proposed that the existing Condition 8 be largely replaced in the varied DPS licence by Condition 12 (general information) and Condition 13 (information relating to a change of control). The requirement to provide Ofcom with information as it may require for the purpose of exercising its functions under the Broadcasting Acts would be extended by reference to the Communications Act.

In addition to your current information obligations, you would be required to inform Ofcom if you, or your parent company, suffered an insolvency-type event or if you, or any individual having control over you (as defined in that Condition), were sentenced to a term of imprisonment on conviction of a criminal offence. The requirements for the supply of specific corporate information documents would be replaced by a requirement for a declaration to be provided at such intervals as Ofcom may determine. In addition, the requirement to provide statements of qualifying revenue at

monthly intervals and also in respect of each entire accounting period would be included in Condition 12 of the varied DPS licence.

The requirement to provide information in relation to listed events (Condition 8(5)(i) of the current DPS licence) may now be found at Condition 7(8) of the varied DPS licence. The requirement to provide details of advertisements (Condition (8)(5)(c) of the current DPS licence) may now be found in Condition 8(8) of the varied DPS licence.

As concerns change of control, you would have an additional obligation to notify Ofcom of proposed changes in control. In addition, it is proposed that the thresholds at which a change in control must be notified be changed to reflect the relevant provisions of the Act. Requirements imposed under Parts IV and V of Schedule 2 to the 1990 Act (see Condition 8(1)(a)(v) and (vi) and 8(5)(e), (f) and (g) of the current DPS licence) are proposed to be deleted as a result of the repeal of these paragraphs under the Act.

Condition 11 of the varied DPS licence would make provision for the retention and production of recordings. Note the new requirement in proposed Condition 11(1) to adopt procedures acceptable to Ofcom: (i) for the retention of recordings of any programme which is the subject of a Standards Complaint, and (ii) in relation to the production of recordings of any programme which is the subject of a fairness complaint (see also Condition 20 of the varied DPS licence). Note further in this regard the requirements of Condition 19(2) of the varied DPS licence.

Information required for the purposes of determining or revising tariffs is dealt with in Condition 4 of the varied DPS licence.

The obligation to supply post-transmission data to Ofcom (Condition 8(5)(d) of the current DPS licence) is now incorporated in Condition 17 (Compliance) of the varied DPS licence.

Fair and effective competition

17. *Current DPS licence Condition 9; varied DPS licence Condition 14*

Minor amendments are proposed to Condition 9 of your licence. The amendments do not extend your obligations under the present condition.

Compliance with ownership restrictions

18. *Current DPS licence Condition 10; varied DPS licence Condition 15*

Note that Condition 15 of the varied DPS licence would add a duty to inform Ofcom of any circumstances which might give rise to a breach of the licensee's obligations thereunder.

Transferability of the Licence

19. *Current DPS licence Condition 11; varied DPS licence Condition 16*

Compliance

20. *Current DPS licence Condition 12; varied DPS licence Condition 17*

The requirements to adopt procedures to ensure compliance are proposed to be extended to include those relating to advance clearance of advertisements. The existing requirement to supply Ofcom with details of the procedures so adopted would be incorporated in Condition 17(3) of the varied

DPS licence (see Condition 8(7) of the current DPS licence). Condition 17 of the varied DPS licence would also reflect your duty to comply with relevant international obligations and your duty under the Television Without Frontiers Directive 89/552/EEC to allocate a majority of transmission hours to European programmes.

Government directions and representations

21. *Current DPS licence Condition 13; varied DPS licence Condition 18*

Provision of airtime to the Commission

22. *Current DPS licence Condition 14; varied DPS licence Condition 21*

Please see paragraph 26 below.

Standards Complaints

23. *Current DPS licence Condition 15; varied DPS licence Condition 19*

As a result of the entry into force of the relevant provisions of the Act, it is proposed that Condition 15 (Complaints) of your licence be replaced with a new condition in relation to standards complaints. Although not yet finalised, work is currently underway to establish co-regulatory mechanisms for handling advertising standards complaints. This may involve an Order being made under the Deregulation and Contracting Out Act 1994 (see paragraph 7 above).

Fairness and privacy complaints

24. *Current DPS licence Condition 16; varied DPS licence Condition 20*

As a result of the entry into force of the relevant provisions of the Act, Ofcom will be the body responsible for exercising functions relating to the consideration of fairness and privacy complaints which are presently exercised by the Broadcasting Standards Commission. Accordingly, your licence will be amended to include, for example, an obligation to comply with certain information requests from Ofcom and to observe the Fairness Code (as defined in the varied DPS licence).

Publication of tariffs

25. *Current DPS licence Condition 18*

It is proposed that Condition 18 of the current DPS licence be removed from the varied DPS licence further to the repeal of the Advanced Television Services Regulations SI 1996/3151 (although this does not affect requirements which may be imposed under the regulatory framework on electronic communications).

New condition on Publicising Ofcom's functions

26. *Varied DPS licence Condition 21*

Please note that the obligation contained in Condition 14 of your current licence to provide airtime to the ITC would be retained by way of the more general requirement set out in proposed Condition 21, reflecting the requirements of Section 328 of the Communications Act.

Power of Ofcom to vary licence conditions

27. *Current DPS licence Condition 17; varied DPS licence Condition 22*

Notices and service

28. *Current DPS licence Condition 21; varied DPS licence Condition 23*

Note that under the varied DPS licence, notices could be served or given in electronic form (see Condition 23(4) of the varied DPS licence).

Surrender

29. *Current DPS licence Condition 25; varied DPS licence Condition 24*

Equal opportunities and training

30. *Current DPS licence Conditions 19 and 20; varied DPS licence Condition 25*

As a result of the entry into force of the relevant provisions of the Act, it is proposed that the condition in relation to equal opportunities and training in your licence be varied. For example, companies which, individually, have over twenty employees or are part of a group having in aggregate over twenty employees, would be expected to make arrangements to promote, in relation to employment with the licence holder, the equalisation of opportunities for disabled persons.

Sanctions for breach of licence conditions

31. *Current DPS licence Condition 23; varied DPS licence Condition 28*

Some amendments have been proposed to this Condition. For example, the amount of the financial penalty that can be imposed by Ofcom for breach of a licence condition is increased from £50,000 to £250,000. Note that the Secretary of State would still be able to specify another sum by order; see Condition 28(3)(b) of the Schedule to the varied DPS licence.

Where a financial penalty imposed pursuant to Condition 28(3)(a) relates to a failure to comply occurring before the commencement of paragraph 14 of Part 2, Schedule 13 to the Act, the penalty will be imposed in accordance with the amounts specified in your current licence. This is reflected in Condition 28(3)(e) of the varied DPS licence.

You should also note Section 346 of the Act, under which amounts payable or penalties imposed under your licence are recoverable by Ofcom as a debt due and your liability for such amounts is not affected by your licence ceasing to have effect.

Revocation

32. *Current DPS licence Condition 24; varied DPS licence Condition 29*

In Conditions 24(2)(a) and (c) of the current DPS licence (see Conditions 29(2)(a) and (c) of the varied DPS licence) references would be inserted to compliance with the requirements imposed by or under Schedule 14 of the Act. It is envisaged that the occurrence of insolvency type events would be caught by Condition 29 of the varied DPS licence. Note that Condition 24(3)(b) of the current DPS licence would be omitted from the varied DPS licence as a result of the repeal of Parts III and IV of Schedule 2 to the Broadcasting Act 1990.

In addition, it is proposed that if the service provided by the Licensee does not constitute a DTPS service, this may also lead to revocation (see Condition 29(2)(f) of the varied DPS licence).

Yours faithfully,

Kip Meek
Senior Partner, Content and Competition